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Supreme Court, U.S.
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No. 04-376

IN THE
Supreme Court of the United States

LEON WOLFORD,
Petitioner,

v.

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

CECIL W. LAWS
Counsel of Record
239 E. New Street
Kingsport, Tennessee 37660
(423) 246-9254

Counsel for Petitioner

November 2, 2004

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REPLY BRIEF FOR PETITIONER

The court of appeals did not overturn the jury's conclusion, which was affirmed by the district court, that petitioner had proven all of the elements of fraud except damages. "Without belaboring the other elements, any fraud by MassMutual did not injure Wolford." Pet. App. 5a. That conclusion ignores the substantial evidence from which the jury concluded that petitioner would neither have been terminated nor resigned absent MassMutual's fraudulent misstatements. Notwithstanding the jury's finding and the substantial evidence that supported it, the court of appeals overturned that judgment on the ground that "MassMutual's misrepresentations caused Wolford no injury." *Id.* at 7a.

That holding substitutes the court of appeals' view of the evidence for that of the jury. MassMutual does not dispute – or even address – this point. Instead, it attempts to undo the result reached at trial by re-litigating all factual aspects of its fraud. But the focus of the petition is on a point about which MassMutual is curiously silent: the court of appeals' erroneous finding that, "had the fraud not occurred, . . . King would have fired him, leaving Wolford in exactly the same position he is in now – that is, without the non-vested commissions or other damages he claims." *Id.* That holding contradicts the record evidence and is judicial conjecture about events that never occurred. By failing to address the issue raised in the petition, MassMutual functionally concedes that petitioner *was* injured by its fraud and that the court of appeals had no basis in law for substituting its views of the facts for that of the jury's, which considered the evidence and made credibility determinations against MassMutual. Thus, summary reversal is entirely appropriate here.

Instead of defending the Sixth Circuit's *sua sponte* concoction of evidence on that point, MassMutual offers a grab-bag of arguments, all of which assume that the evidence should be viewed in a light *unfavorable* to petitioner, the verdict-winner. Not only are MassMutual's

arguments completely irrelevant to the error committed by the Sixth Circuit, they are wrong on their own terms.

A. MassMutual's Claim That It "Could Have" Terminated Wolford And King Is Irrelevant

MassMutual argues that it could have terminated its general agent Tom King at will, and thereafter stepped into King's shoes and terminated petitioner at will. MassMutual did neither of these things, yet now claims the mere possibility that it once could have done so gives it an absolute defense to the fraud found by the jury.

MassMutual is compelled to take this tortuous route because its executives testified that MassMutual lacked the authority to terminate petitioner's contract. *See* C.A. App. 1304, 1346. The career contract designated the parties as King and Wolford, and MassMutual is not listed as a party. *See id.* at 192. MassMutual admitted that the parties to the contract were King and Wolford, and that MassMutual's signature was only an approval of the contract and a guaranty of petitioner's commissions in the event of King's termination. *See id.* at 1164-65. A MassMutual executive stated that respondent intended to modify its contract to give it power to terminate "as opposed to going through the General Agent." That testimony admitted that MassMutual had no right to terminate petitioner under the contract as it existed. *Id.* at 1460. King testified that MassMutual did not have such authority and could only make recommendations, and that only the general agent had the authority to terminate the contract with the agent. *See id.* at 1070-72. Petitioner testified that only he or King could terminate his contract. *See id.* at 1014. If MassMutual had the power to terminate petitioner, the contract would have so provided, yet *King's contract with Wolford contains detailed termination provisions that do not include the right of MassMutual to terminate Wolford. See id.* at 194. Thus, the only condition under which MassMutual had any power to terminate petitioner's career contract with King *was if it first terminated King*. MassMutual concedes as much when it care-

fully states that it "arguably lacked direct authority to terminate [petitioner]." Opp. 2.

Yet that condition precedent never occurred. MassMutual therefore never had a right to terminate petitioner's contract with King. The contract was at will only between petitioner and King, and not between petitioner and MassMutual, contrary to MassMutual's implication regarding "Wolford's at-will relationship with MassMutual." Opp. 21. As the petition demonstrates, the jury had substantial evidence from which it could conclude that King would not have terminated petitioner's contract without a valid reason. The evidence further supported the conclusion that King would not terminate petitioner, a top producer, absent MassMutual's fraudulent representations because King believed petitioner had done nothing wrong. *See* C.A. App. 1087-89.

MassMutual thus argues that petitioner should be denied his verdict because of what MassMutual could theoretically have done. MassMutual puts it as follows: "The bottom line is the same: switching from one doomed at-will relationship (career agent) to another doomed at-will relationship (broker) caused Wolford no cognizable injury." Opp. 21. But those are not the facts. The issue at trial and before the court of appeals was not merely a switch of contracts; the issue was whether MassMutual fraudulently induced petitioner to resign his career contract. To use MassMutual's vernacular style, the bottom line is the same: had MassMutual not fraudulently accused petitioner of falsifying a claim form and soliciting applications from unqualified miners, neither King nor petitioner would ever have considered resignation or termination. The court of appeals' factual finding to the contrary contradicts the evidence in the record.

Although the court of appeals did not state that it was reversing the jury's verdict because petitioner's career contract with King was at-will and such contracts prohibit independent tort claims for fraud, MassMutual now makes that argument to this Court. *See* Opp. 2. However, the theoretical possibility that MassMutual could

have accomplished its end through legitimate means does not change the fact that MassMutual instead made fraudulent accusations that resulted in petitioner's resignation. Tennessee law does not permit a person to accomplish by fraud what may otherwise be done legally. *See Morris v. Morris*, 258 S.W.2d 732, 734 (Tenn. 1953). Intentional conduct designed to injure another in the rightful pursuit of business interests is an actionable wrong under long-established Tennessee law. *See Hutton v. Watters*, 179 S.W. 134, 135 (Tenn. 1915). *Hutton* discusses the difference between achieving an end by legal means and doing so through intentionally tortious conduct. *Id.* at 135-36. "In short, if an act be hurtful to another, intentional, and without legal justification, it is malicious in the true legal sense, therefore unlawful, and is actionable." *Id.* at 135. In *Hutton*, the court specifically noted that, in the context of employment at will, a person may discharge another for no reason but he may not do it "'solely for the purpose of injury to another, or hold a threat over the employee *in terrorem* to fetter the freedom of the employe[e], and for the purpose of injuring an obnoxious party.'" *Id.* at 138 (citation omitted).

MassMutual erroneously argues that a trio of cases demonstrate that it was immunized from fraud liability because it could have theoretically terminated King and then terminated petitioner at will. *See* Opp. 2. MassMutual's reliance is misplaced. Here, the jury found "that MassMutual made intentional misrepresentations to him to induce him to resign his career contracts with General Agent, Tom King." C.A. App. 167. The cases cited by MassMutual present classic employee at-will-termination issues. None involves a contract factually similar to petitioner's case, with three signatories having different rights and obligations.

B. MassMutual's Argument That Petitioner Did Not Plead Fraud Has No Merit

MassMutual asserts that "[t]he complaint did *not* allege the theory of fraud raised here, *i.e.*, that the Field Prac-

tices investigation was a sham intended to trick King and Wolford, through trumped-up allegations, into choosing resignation to avoid termination." Opp. 9. MassMutual cannot dispute, however, that petitioner's complaint put it on notice of his contention that its "field audit" consisted of "accusations, insinuations, and innuendo [that] were being used against him to undermine and damage his reputation and good standing with . . . General Agent King." C.A. App. 28. It was thus fully aware of that theory from the outset of the litigation.

C. MassMutual's Claim That Petitioner Was Not Informed He Could Retain His Commissions Overlooks Critical Evidence

MassMutual implies that King never informed petitioner that he could retain his commissions when he resigned his career contract and entered the broker contract. *See* Opp. 9, 13. However, MassMutual's selective culling of testimony reflects only a single conversation between King and petitioner. As the district court recognized, the two had many other conversations. King testified that, before petitioner resigned, he had telephone discussions with three of MassMutual's executives about allowing petitioner to "have a broker's contract to be in the information loop so he can do the service work *because he will be retaining his renewal stream.*" C.A. App. 1042 (emphasis supplied). King also testified: "they all suggested it made sense to them to allow him to continue with a broker's contract." *Id.* at 1043. King further testified he had a subsequent telephone conversation with petitioner about the broker's contract and told petitioner: "You will continue to get your renewals." *Id.* at 1045. Petitioner testified that King told him, "[I] think it would be in your best interest if you resign your career contract and took a broker contract because if you get terminated it will be very hard for you to get another AAA Carrier like MassMutual for you to work for." *Id.* at 944-45. All of this testimony demonstrates that petitioner had every reason to believe he would retain his commissions – and

the lost commissions constituted the crucial evidence of damages to petitioner. *See* Pet. 16 n.3.

D. MassMutual's Complaints About The Admission Of Certain Evidence Are Meritless

MassMutual asserts that Hunady's report – which contained notes concerning compound hearsay interviews he claims were conducted with miners – should now be considered, even though it was excluded at trial. There is no need to do so. The court of appeals explicitly noted that litigation discovery had shown that the true results of MassMutual's investigation were concealed, and that certain of MassMutual's accusations against petitioner were "wrong." *See* Pet. App. 2a-3a. And the court of appeals did not disturb the trial court's holding that the elements of fraud other than damage had all been proven at trial. Thus, the court of appeals indicated that there was legally sufficient evidence to prove MassMutual fraudulently induced petitioner to resign.

MassMutual asserts that petitioner's "contention here, that the investigation was a 'fraud,' is absurd, as that charge rests upon his effort to keep the [Hunady] report from the jury – an egregious error compounded by the court's inexplicable decision allowing *him* to introduce similar evidence from the investigation." Opp. 5. MassMutual again misleads. Although Hunady's hearsay report was excluded, his testimony was admitted at trial. The specific evidence excluded by the district court consisted only of "hearsay statements as a part of his report." C.A. App. 1233-34. The district court expressly permitted Hunady to "testify as to what he – as to the conclusion he reached after conducting the investigation, but I'm not going to accept hearsay statements as a part of his report. Okay?" MassMutual's counsel responded: "Okay. I understand." *Id.*

Indeed, MassMutual was not prevented from presenting evidence – including Hunady's testimony – about the basis for its termination requests as well as the Field Practices Committee's alleged reasons for asking King to terminate

petitioner.[1] The jury rejected MassMutual's accusations that petitioner submitted unqualified insurance applications.[2] The court of appeals' judgment did not rest on whether petitioner proved all elements of fraud, but rather on his alleged failure to present sufficient evidence that he was damaged by MassMutual's fraud.

E. MassMutual's Purported New Evidence Was Properly Rejected By The District Court

MassMutual asserts that a tape recording of a telephone conversation between petitioner and King "flatly disproves the fraud claim and the sworn testimony of Wolford and King." Opp. 13. No discussion of this tape recording can be found in the court of appeals' opinion; indeed, this purported evidence was not addressed in any way by the court of appeals.

The tape recording was presented to the district court during the pendency of the appeal to the court of appeals.

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[1] For example, King's letter of June 5, 1997, to MassMutual sets forth the specifics of Hunady's investigation as described by MassMutual to King and Wolford in their June meetings. This letter states that MassMutual claims Hunady interviewed "30+?" of Wolford's clients and "19+" state the applications are inaccurate and "8+" are spending a lot of time underground as laborers. C.A. App. 499-500. Additionally, MassMutual introduced a three-page summary of the FPC's and Hunady's investigation that states, *inter alia*: "Based on . . . over 30 interviews of miners, there were numerous cases in which the applications . . . inaccurately listed the duties of miners and the extent of the underground activity." *Id.* at 768-70.

[2] Nor is MassMutual's characterization of what was said by the miners at deposition (Opp. 5) accurate. For example, when Hunt referred to information that "definitely was not accurate," he was speaking of Wolford's description of a health insurance policy issued by Golden Rule Insurance – not a MassMutual policy. Marcum, Fritz, and Hunt met the job description and time underground requirements. *See* C.A. App. 1507, 1514-15, 1526, 1528, 1531, 1542. Marcum's allegedly inaccurate medical history referred to by MassMutual was completed by a nurse, not by Wolford. *See id.* at 1507, 1514-15. Fritz's comment "that's not right" referred to percentages of management duties, not time underground, *id.* at 1530-31, as the applications themselves contained nothing about time underground.

The district court issued a 17-page decision rejecting MassMutual's motion under Federal Rule of Civil Procedure 60(b). A copy of the district court's decision, which rejected the contention that the tape was any more than cumulative evidence, is reproduced in the attached Appendix. The district court stated in pertinent part:

> The tape recording presented by defendant has nothing to do with the misrepresentations concerning the Grant Norman APS [claim form] or the nine applications submitted by plaintiff.
>
> The premise of defendant's Rule 60(b) motion is that King's and Wolford's testimony does not match the single 16 minute taped conversation out of more than 90 minutes of their documented telephone discussions between July 11 and July 15. MassMutual has attempted to isolate this single July 13 conversation from the total context of this case and from the jury's verdict, found by clear and convincing evidence, of fraudulent misrepresentations which began as early as March 1997. The tape recording is merely cumulative of evidence considered by the jury and the court and would not have produced a different result if presented before the original judgment. Reply App. 10a-11a.

F. MassMutual's Contention That The Jury Was Not Properly Charged On Fraud Overlooks The District Court's Instructions

MassMutual falsely asserts (at 12) that "[t]he jury was not charged to consider whether the Field Practices investigation was a fraud." The district court instructed the jury twice, without objection by MassMutual, concerning petitioner's fraud claims: at the beginning of the trial and at the conclusion of the evidence. *See* Preliminary Instructions, 5/2/00 Tr., Vol. I, at 46; C.A. App. 1391-435. The jury was explicitly instructed that for petitioner to recover for intentional misrepresentation he must prove each of the elements by a preponderance of the evidence.

See C.A. App. 1419. The jury was also instructed that, if petitioner failed to prove any of the required elements, the jury must find for MassMutual. *See id.* at 1420. Contrary to MassMutual's suggestion that the jury did not consider issues relating to its investigation of petitioner, the jury was specifically instructed that the contested factual issues it would have to resolve included the following:

> "Whether plaintiff in adding material to the Grant Norman Attending Physician's Statement after the physician signed it intended to mislead defendants." *Id.* at 1394.
>
> "Whether plaintiff submitted applications for disability income insurance to defendants which plaintiff knew were fraudulent or misleading regarding:
> a. job titles of the applicants; and/or,
> b. the types of tasks or occupational duties performed by the applicants and /or
> c. the amount of time which the applicants spent underground and in mines performing their duties." *Id.* at 1393.

MassMutual did not object to those jury instructions, and cannot now claim that the jury never considered the bona fides of the charges that formed the basis for MassMutual's investigation.

G. MassMutual's Characterizations Of The Court Of Appeals' Judgment Shows Disregard For The Constitutional Right To A Jury Trial

MassMutual does not dispute, but attempts to trivialize, the fact that the court of appeals substituted its view of the facts for the evidence that the jury accepted in reaching its verdict. In doing so, the court of appeals usurped the jury's constitutional prerogatives under the Seventh Amendment.

MassMutual insists that what it characterizes as "routine appellate review for sufficiency of the evidence" does not constitute a "compelling reason" for certiorari and

that this Court "do[es] not ordinarily grant certiorari to review judgments based *solely* on questions of fact." Opp. 19 (internal quotation marks omitted; emphasis added). However, a court of appeals' Rule 50 review of evidentiary sufficiency raises not questions of fact, but rather questions of law that involve constitutional mandates of due process and the right to have juries, not judges, decide facts. This Court has held that review of the type conducted by the Sixth Circuit below impermissibly negates the "essential characteristic" allocating the "functions between judges and jury." *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 537 (1958).

When a court of appeals substitutes its version of the evidence for diametrically opposite evidence in the record, which was accepted by the jury – whether under the rubric of Rule 50, as here, or otherwise – the very integrity of the judicial process is at issue. When a court of appeals reweighs the evidence and substitutes its view of the evidence for that of the jury, the Fifth and Seventh Amendment rights to due process and a jury trial are implicated. This Court stands as the only bulwark guaranteeing the vitality of these constitutional mandates and protecting citizens from abrogation of their rights by a court of appeals, as was done here. From time to time, it is important for this Court to use a case to demonstrate those fundamental principles. Because respondent cannot defend the Sixth Circuit's encroachment on the jury function but instead devotes its entire Opposition to irrelevant matters that seek to obscure the fundamental error committed by the court below, summary reversal is entirely appropriate.

* * * * *

For the reasons stated herein and in the petition, the petition for a writ of certiorari should be granted, and the judgment of the court of appeals should be summarily reversed.

Respectfully submitted,

CECIL W. LAWS
Counsel of Record
239 E. New Street
Kingsport, Tennessee 37660
(423) 246-9254

Counsel for Petitioner

November 2, 2004

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APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

No. 3:98-CV-110 (Phillips)

LEON WOLFORD,
Plaintiff/Counter-Defendant,

v.

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,
MML PENSION INSURANCE COMPANY AND
C.M. LIFE INSURANCE COMPANY,
Defendants/Counter-Plaintiffs.

[Filed Sept. 30, 2002]

MEMORANDUM AND ORDER

Plaintiff Leon Wolford sued defendants for procurement of breach of contract and for intentional misrepresentation. The case was tried to a jury which found in favor of Wolford and awarded plaintiff compensatory damages of $1.9 Million Dollars and punitive damages of $54.9 Million Dollars on plaintiff's claim of intentional misrepresentation. The court remitted the punitive damages award to $7.6 Million Dollars. Following post-trial motions, final judgment was entered on April 23, 2001, and defendant MassMutual appealed to the Sixth Circuit Court of Appeals, where the appeal is now pending.

Defendant MassMutual moves for relief from judgment pursuant to Rule 60(b)(2), 60(b)(3) and 60(b)(6) on the basis of newly discovered evidence. The new evidence is a recently discovered tape recording of a telephone conversation between plaintiff and MassMutual's general agent,

Tom King, which defendant asserts directly refutes plaintiff's claim that he was fraudulently induced to resign his career contract as a MassMutual agent. Defendant requests an order directing MassMutual to petition the Sixth Circuit to remand the case to this court for further proceedings. Defendant also requests an order allowing discovery on the issues raised by this motion and relevant to whether the final judgment entered on April 23, 2001 should be re-opened or set aside [Doc. 175].

In support of its motion, MassMutual states that plaintiff's claim for fraud and misrepresentation was specifically grounded on his assertion that he was fraudulently induced by Tom King's statements to resign his career contract with King. Defendant states that plaintiff and King testified that these statements were made during a telephone conversation on July 13, 1997. Defendant asserts that a newly discovered tape recording demonstrates that the exchange between Wolford and King contained no promise regarding (1) the advantages of resigning rather than being fired, (2) a broker's contract with MassMutual, (3) the need to preserve Wolford's reputation and employability by another top rated company, (4) non-vested commissions, or (5) renewals. Thus, defendant argues, plaintiff's entire claim for intentional misrepresentation rests on false testimony about the July 13 conversation between Wolford and King.

Moreover, defendant avers the existence of the July 13 tape recording was concealed from MassMutual during discovery. At a deposition on April 7, 1999, King was asked to produce documents pertaining to Wolford, and in response King produced certain files. King never supplemented his document production in the Wolford case with the tape of the July 13 telephone conversation, and its existence was never disclosed to the defense.

After the verdict in this case, King filed his own lawsuit against MassMutual for tortious interference with his contract with Wolford. Counsel for MassMutual learned from King in a deposition that he routinely tape recorded

conversations and kept the tapes. When plaintiff was deposed in the King lawsuit, he testified that he learned of King's practice of tape recording conversations prior to his trial testimony in this case, but did not know that King had tape recorded their conversations regarding his resignation from MassMutual.

Counsel for MassMutual obtained a copy of the July 13 tape in discovery in the King case and it was eventually turned over to defense counsel in this case. Defendant avers these facts warrant relief under Rule 60(b)(2). Defendant states that the tape recording could not, in the exercise of due diligence, have been discovered in time to move for a new trial under Rule 59, and that the instant motion was filed within a reasonable time after discovery of the tape recording. Further, the tape recording contradicts Wolford's and King's testimony at trial and would likely change the outcome of the case.

Defendant also states that MassMutual is entitled to relief under Rule 60(b)(3) because King and Wolford concealed the existence of the tape recording from defendant until it was discovered in the King case. Defendant asserts that Wolford and King both testified consistently as to the same false version of their conversation. Lastly, defendant argues that relief is also warranted under Rule 60(b)(6) which provides relief in "exceptional or extraordinary circumstances."

Plaintiff has responded in opposition, stating that the misrepresentations committed by MassMutual to induce his resignation were extensive and were not limited to the subject matter of the tape recorded conversation of July 13. Plaintiff further states that all evidence appearing in the tape already exists in the trial record; the tape provides no new evidence; and all evidence in the tape is merely cumulative of evidence already considered by the jury and the court. Plaintiff never possessed or controlled the tape. He had no knowledge of the tape prior to its production by Tom King in King's case. Therefore, he committed no fraud, misrepresentation or other miscon-

duct. Moreover, had MassMutual been provided the tape prior to judgment, the tape would not have changed the jury's verdict or the judgment. The tape recording merely corroborates other trial evidence proving MassMutual's extensive misrepresentations. Therefore, plaintiff asserts that MassMutual's motion for relief from the judgment should be denied [Doc. 184].

In *First Nat'l Bank of Salem v. Hirsch*, 535 F.2d 343, 345-46 (6th Cir. 1976), the Sixth Circuit outlined the proper procedure for consideration by the district court of a Rule 60(b) motion filed while an appeal on the merits is pending. The aggrieved party should file its motion in the district court, not the Sixth Circuit. In considering the motion, the district court's jurisdiction is limited so long as the appeal is pending. It may (1) find that the motion appears to have some merit and therefore direct the movant to petition the Sixth Circuit to remand the case to the district court for further proceedings, (2) decline to consider the motion and let the appeal take its course first before entertaining the motion, or (3) deny the motion outright. *Id.*

Defendant's Rule 60(b) motion for relief is based on Rule 60(b)(2), 60(b)(3) and 60(b)(6), Federal Rules of Civil Procedure. Rule 60(b) provides in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: . . . (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; or (b) any other reason justifying relief from the operation of the judgment.

The decision to grant or deny motions under Rule 60(b) is discretionary with the district court. *Davis v. Jellico Community Hospital*, 912 F.2d 129, 132 (6th Cir. 1990).

In order to prevail on a Rule 60(b)(2) motion a "movant must demonstrate (1) that it has exercised due diligence in obtaining the information and (2) [that] the evidence is material and controlling and clearly would have produced a different result if presented before the original judgment." *Good v. Ohio Edison Co.*, 149 F.3d 413, 423 (6th Cir. 1996) (citations omitted). I find that although defendant has satisfied the "due diligence" requirement of Rule 60(b)(2), defendant has not shown that the evidence would have changed the outcome of the trial.

King's deposition was taken in the Wolford case on April 7, 1999. He was asked if there were any additional files relating to Wolford's termination or any communications with Wolford or his attorneys relating to this claim. On April 9, 1999, King provided counsel for both parties an additional piece of correspondence, but no tape recordings. MassMutual had no reason to believe that any other evidence existed in Tom King's files.

Counsel for MassMutual obtained the tape in December 2000, pursuant to a discovery request in the King case. Transcripts were made in February 2001. In October 2001, King confirmed that the tape was the transcript of his July 13, 1997 telephone conversation with Wolford. In preparation for Wolford's deposition, counsel contacted MassMutual's appellate counsel in November 2001. It was at that time that counsel learned that the tape had not been produced in the Wolford case and he provided a copy of the transcript to appellate counsel. The instant motion was filed on February 12, 2002.

I find that MassMutual was reasonable and diligent in relying on testimony and discovery responses by King that he had provided all evidence in his possession. Thus, defendant has shown that it exercised due diligence in obtaining the information and bringing it before the court; however, defendant has not shown that the tape recording is material evidence that would clearly have produced a different result at trial.

Under Rule 60(b)(2), "newly discovered evidence" applies to "evidence [that] is material and controlling and clearly would have produced a different result if presented before the original judgment." *Good v. Ohio Edison Co.*, 149 F.3d 413, 416 (6th Cir. 1998). As the Sixth Circuit explained, this means that the newly discovered evidence cannot be merely impeaching or cumulative.

The telephone records and affidavits of King and plaintiff submitted in response to defendant's motion confirm that King and Wolford had not one conversation as asserted by defendant, but multiple discussions between July 11, 1997 and July 15, 1997, the date of Wolford's resignation.

The telephone records reflect Wolford's telephone calls to Tom King during the relevant period in July 1997:

Date	Time	Number Called	Minutes
7/11/97	10:29 a.m.	531-0171	10
7/14/97	2:48 a.m.	531-0171	1
7/14/97	9:56 a.m.	531-0171	1
7/14/97	11:03 a.m.	531-0171	1
7/14/97	11:44 a.m.	531-0171	2
7/14/97	7:35 p.m.	531-0171	33
7/15/97	10:33 a.m.	531-0171	1
7/15/97	12:12 p.m.	531-0171	19

The telephone records also reflect King's telephone calls to Wolford:

Date	Time	Number Called	Minutes
7/14/97	3:15 p.m.	239-6270	16
7/15/97	11:02 a.m.	239-6270	9

As part of his response, plaintiff submitted the affidavit of Tom King who stated that at the time of the trial of this

case, he believed that he had a telephone conversation with plaintiff on July 13, 1997, but did not remember tape recording any of his telephone conversations with plaintiff. King further stated that the tape itself was not dated at the time it was made and no effort was made to determine the date of the tape until it was located during document production in his lawsuit against MassMutual. King first realized that the tape contained a conversation with plaintiff concerning his resignation when he listened to all his tape recordings in preparing his response to MassMutual's discovery request. When King listened to the tape, he told his wife that he thought the date of the conversation was July 13, 1997, and she wrote that date on the envelope containing the tape. This occurred months after the Wolford trial.

King further stated that he now believes that he was unintentionally misled about the exact date of the taped conversation with plaintiff. Plaintiff's resignation letter was dated July 13, 1997. King remembered that his conversations with plaintiff occurred just prior to receipt of Wolford's resignation. He assumed at trial that the taped conversation occurred on July 13 because Wolford's resignation was dated July 13. King stated that he received Wolford's resignation by fax on July 15, 1997 at 12:34 p.m. His copy of the resignation letter bears a fax stamp of July 15, 1997 at 12:34 p.m. The copy of Wolford's resignation letter presented at trial belonged to Wolford and did not contain the fax stamp showing its transmission date. After reviewing his telephone records, King stated that he now believes the tape recorded phone call occurred on July 14 instead of July 13. There are no long distance calls to plaintiff on his records dated July13, 1997.

In his affidavit, King verified that the substance of his testimony at trial was true and accurate. Before he received plaintiff's resignation, he told plaintiff during several telephone conversations, that he had been informed MassMutual had sufficient evidence to warrant plaintiff's termination; that he thought plaintiff should resign in

order to avoid being terminated; that plaintiff would not lose his renewal commissions; and that he expected that a broker's contract would be accepted by MassMutual. In addition, King attested his telephone records reflect that he made another call to plaintiff on July 15, 1997 which lasted approximately 9 minutes, and was placed approximately 90 minutes before he received plaintiff's resignation letter by fax. King stated that he had several telephone conversations with plaintiff about the need for his resignation prior to receiving plaintiff's resignation on July 15, 1997. King concludes by stating the tape recording at issue contains only a portion of his discussions with plaintiff and confirms the substance of his trial testimony.

Plaintiff submitted his own affidavit in which he states he testified at trial that before submitting his resignation to King he had a telephone conversation with King on July 13, 1997 in which King suggested that he resign from his career contract to avoid termination. He also testified that King told him that he could have a broker's contract if he resigned and that his renewals would continue. Based on that discussion, he submitted his resignation to King and entered into broker's contracts with King. He prepared and dated his resignation on July 13, 1997. Before he submitted his resignation, plaintiff states, King told him things were looking bad for him with MassMutual. King encouraged him to resign to avoid termination. King also told him he could have broker's contracts to service his existing clients, but not for new business. Further, King told him his renewal commissions and pension would continue. At his deposition in the King case, plaintiff was shown the transcript of a tape-recorded telephone conversation dated July 13, 1997. Plaintiff testified he was never aware that King tape recorded any of their conversations.

Plaintiff stated that he had reviewed his telephone records for June and July 1997, which confirm that he made several calls to King between July 11 and July 14. His

records also reflect an entry on July 15, 1997 at 12:31 p.m. which is the telefax communication of his resignation letter to King. Plaintiff attested that his testimony at trial was true and accurate as to the substance and sequence of events, but he may have been mistaken in his testimony that he had a telephone conversation with King on July 13, since the telephone records do not contain a call on that date. However, he believes that King called him on that weekend.

The affidavits of Wolford and King, along with their respective telephone records, show that they had several telephone conversations between July 11, 1997 (the date of MassMutual's request that King terminate his contract with plaintiff) and July 15, 1997 (the date of plaintiff's resignation). In fact, the records show that there were actually two telephone calls on July 14 – the 16 minute taped conversation relied on by defendant, and a subsequent 33 minute conversation that evening, along with 9 minute and 19 minute telephone calls on July 15 prior to plaintiff's facsimile transmission of his resignation.

The tape recording of the conversation between King and plaintiff does not contradict or refute the trial evidence. It merely reflects a single conversation between King and Wolford during the relevant period prior to Wolford's resignation on July 15, 1997. At best, the tape would be impeaching as to the date of the telephone conversation. Nevertheless, whether the conversation occurred on July 13 or 14, the substance of the tape is consistent with the trial evidence and is merely cumulative of the evidence presented at trial. The court is not convinced that introduction of the tape at trial would have produced a different result.

The evidence presented at trial showed that MassMutual made numerous misrepresentations prior to King and Wolford's phone conversations in July 1997. MassMutual misrepresented to plaintiff that he violated the company's rules and regulations by completing Grant Norman's APS and by supplying misleading information.

However, King testified that he presented copies of his e-mails from MassMutual confirming plaintiff complied with established procedure by completing the form. Further, evidence from Grant Norman and Dr. Vellayan confirmed that the information plaintiff added to the APS was correct.

Defendant also misrepresented to plaintiff that he had committed insurance fraud by submitting applications for insurance from unqualified clients. In June 1997, plaintiff and King met with MassMutual's Field Practices Committee, where plaintiff was told he submitted false information on eight applications. Arthur Foresi, director of underwriting for defendant, testified MassMutual conducted investigations to ascertain the accuracy of information contained in applications submitted by plaintiff. He acknowledged these independent investigations verified the information on the applications. Further, Matt Winter, a vice president of defendant, testified that MassMutual's applications contained provisions that authorized MassMutual to void the policies for any material misstatement or omission of facts, yet MassMutual canceled none of the alleged fraudulent policies.

Plaintiff requested the names of the applicants for the alleged misleading applications. King also requested this information, but neither plaintiff nor King were provided with the names of the applicants. Defendant issued subpoenas for nine applicants, presumably the same as those identified by the Field Practices Committee. MassMutual took video depositions from five; all confirmed that plaintiff explained the underwriting rules to them, they qualified, and the information in their applications was accurate. Defendant than canceled the remaining depositions. The tape recording presented by defendant has nothing to do with the misrepresentations concerning the Grant Norman APS or the nine applications submitted by plaintiff.

The premise of defendant's Rule 60(b) motion is that King's and Wolford's testimony does not match the single

16 minute taped conversation out of more than 90 minutes of their documented telephone discussions between July 11 and July 15. MassMutual has attempted to isolate this single July 13 conversation from the total context of this case and from the jury's verdict, found by clear and convincing evidence, of fraudulent misrepresentations which began as early as March 1997. The tape recording is merely cumulative of evidence considered by the jury and the court and would not have produced a different result if presented before the original judgment.

Defendant also argues it is entitled to relief under Rule 60(b)(3) based on fraud, misrepresentation or other misconduct of plaintiff. Clear and convincing evidence is required to support a Rule 60(b)(3) motion. *Jordan v. Paccar, Inc.*, 97 F.3d 1452 Table, 1996 WL 528950 *5 (6th Cir. 1996) *unpublished*. I cannot find by clear and convincing evidence that King's failure to produce the tape recording in this case was fraud, intentional misrepresentation, or other misconduct under Rule 60(b)(3).

Plaintiff submitted the affidavit of Marjorie Murrian, former administrative assistant to King. Ms. Murrian stated that over the years, King would regularly tape record some telephone conversations, sometimes the tapes would be transcribed, other times the tapes would be retained, but most of the time, the tapes were reused to record other conversations or for King's dictation. The retained tapes were generally not labeled and were kept in envelopes in a file cabinet. The tapes remained locked in the file cabinet for years and were forgotten about. Prior to his deposition in this case in April of 1999, King asked her to pull all of the files relating to plaintiff's resignation. After the deposition, King asked her to look to see if there were any other documents or information relating to plaintiff's resignation. She found one other document which was provided to MassMutual. Ms. Murrian stated that she was not aware that King had tape recorded any conversations with plaintiff relating to his

resignation and it did not occur to her to look for such tapes in response to King's request.

Ms. Murrian further stated that when MassMutual requested King to produce tape recordings relating to his lawsuit in the fall of 2000, King asked her to pull all the retained tapes so that he and Mrs. King could listen to them for the purpose of determining whether any might be relevant to his lawsuit. She stated that she had never seen King review the contents of the tapes before, and it was her belief that King did not conceal any information from MassMutual in the Wolford litigation. King specifically instructed her to preserve anything that could be related to the Wolford resignation and to provide copies of such information to MassMutual. She was never instructed to destroy or to conceal any information regarding Wolford's resignation.

Moreover, plaintiff stated in his affidavit that he did not know that King taped any of their conversations. Although he discovered that King taped some telephone conversations prior to his trial, he did not learn of the July 13 tape until his deposition in the King case in November 2001. He never had possession or control of the tape.

The affidavits of Majorie Murrian and Tom King explain how the unlabeled and undated tape was stored in King's office; how it was only located by King after the trial in this case; how it was produced by King when tapes were requested by MassMutual in the King case; and how it was incorrectly, but in good faith, dated by King as a July 13, 1997 conversation when the conversation actually occurred on July 14, 1997. Defendant has not shown that King's failure to disclose the existence of the tape was anything more than inadvertent mistake. The argument could be made that since Tom King was defendant's general agent, MassMutual constructively had knowledge and possession of the tape recording prior to the trial in this case. Moreover, Plaintiff was unaware of the existence of the tape prior to his deposition in the King case in

November 2001. Plaintiff had neither knowledge that a tape recording existed, nor did plaintiff have possession of the tape. Defendant had not shown that the failure to produce the tape in this case was the result of fraud, misrepresentation or other misconduct on the part of plaintiff or Tom King. Accordingly, defendant is not entitled to relief under Rule 60(b)(3).

Lastly, I find that Rule 60(b)(6) is inapplicable. Courts should apply Rule 60(b)(6) only in exceptional or extraordinary circumstances that are not addressed by the first numbered clauses of the rule. *Pierce v. United Mineworkers*, 770 F.2d 449, 451 (6th Cir. 1985) *cert. denied*, 474 U.S. 1104 (1986). Notwithstanding the extraordinary nature of relief under Rule 60(b)(6), district courts may only employ the rule when "something more" than one of the grounds contained in Rule 60(b)'s first five clauses is present. *Hooper v. Euclid Manor Nursing Home, Inc.*, 667 F.2d 291, 294 (6th Cir. 1989).

Defendant's only asserted basis for its motion is the tape. Since defendant's motion fails as controlling new evidence, MassMutual has no further recourse under Rule 60(b). Since defendant cannot prevail on the Rule 60(b)(2) or 60(b)(3) claims, Rule 60(b)(6) cannot offer defendant relief in its stead. *See Flynt v. Brownfield, Bowen & Bally*, 726 F. Supp. 1106, 1111 (Ohio 1989).

Conclusion

For the foregoing reasons, defendant's motion for relief from judgment pursuant to Rule 60(b)(2), 60(b)(3) and 60(b)(6) is hereby **DENIED**.

IT IS SO ORDERED.

ENTER:

/s/ THOMAS W. PHILLIPS

Thomas W. Phillips
UNITED STATES MAGISTRATE JUDGE